APPENDIX.

HASKELL v. HASKELL, TWO CASES:
(1) 201 App. Div. 414, 194 N. Y. S. 28; affirmed without opinion, 236 N. Y. 635, 142 N. E. 314;
(2) 207 App. Div. 723, 202 N. Y. S. 881, affirmed without opinion, 254 N. Y. 569, v73 N. E. 870.

In the two *Haskell* cases the situation briefly was that plaintiff wife and defendant husband were married in 1900. A son, the only child of the marriage, was born in 1902 and plaintiff and defendant continued to live together until 1916. At that time they separated and a separation agreement was entered into between them. *No divorce ever occurred throughout the period of the entire litigation.* Under the separation agreement defendant agreed to pay plaintiff $250 per month, provided that in the event of a violation by the wife of her covenants the sum should be reduced to $75 per month. All the above facts and the ensuing litigations occurred in the State of New York.

Reference has already been made to these two cases in the body of the brief, *supra*, pp. 26-28. Since both affirmances were without opinion by the Court of Appeals of New York and since the opinions of the Appellate Division are unsatisfactory, it has seemed advisable to resort to the briefs and records in the two cases to see what was determined by the Court of Appeals. This procedure in determining the law of New York on a given point has the sanction of the Court of Appeals of that State. See *Title Guarantee and Trust Co.* v. *Mortgage Commission*, 273 N. Y. 415, at 425; 7 N. E. (2d) 841, at 845, where the case of *Perillo* v. *Zunino* (259 N. Y. 21, 180 N. E. 882) was so treated and considered by the New York Court of Appeals. Whatever may be the merits of deciding important issues of law without opinion—*Cf. Honeyman* v. *Hanan*, 300 U. S. 14; but *cf.* the opinion (R. 113-115) in the instant case which ignores many of the controlling issues of law presented here (R. 126-136)—there is no doubt but that the *Haskell* cases decisively determined the law of New York upon these points and were intended to do so. The greatest judges of New York sat in these cases and participated in

the judgments, including Mr. Justice CARDOZO, later of this Court. Certainly their decision upon what the law of New York *is* should not be ignored by the Court of Appeals.

We turn now to the record and briefs in the two *Haskell* cases. Copies of these records and briefs are available in New York City at the courthouse of the Appellate Division, First Department, at the Association of the Bar of the City of New York, and at the New York County Lawyers' Association, and of course at the New York Court of Appeals in Albany, New York. All facts and page references hereinafter stated are supported by photostatic copies of the pages in question which, if requested, we shall be glad to make available to the Court. We now refer to the facts of the first *Haskell* case.

The defendant husband did not pay to plaintiff wife the sum of $250 for the month of May 1917. Suit was instituted by plaintiff, judgment was recovered by her and that judgment was paid. Defendant did not pay any sum for the months of June and July 1917, and another suit was brought for these months, judgment recovered and appeal taken to the Appellate Term; the judgment was affirmed and this judgment was paid.

A third suit was started for payments subsequent to July 1917, which amounts were paid after the affirmance by the Appellate Term in 1918 of the judgments for the months of June and July 1917 and after the commencement of subsequent litigation.

The first *Haskell* case was then instituted by the service of a summons and complaint out of the Supreme Court on the defendant on January 14, 1919, *while the prior litigation* was still pending (1st *Haskell* record, p. 1). This first *Haskell* suit was for necessaries for the period from August 1, 1918 onward. Defendant's Exhibits 1, 2 and 3 (letters of demand between husband and wife) to this action were written while the prior litigation was pending.

The important fact here, of course, is that the letters of demand (Defendant's Exhibits 1, 2 and 3) for custody of the child of the parties *were written by the husband during litigation and while outstanding judgments secured by the wife against him were unpaid.* Despite these facts the wife was held unjustified in her denial of custody to the

husband, and was held to have cut off her right to support *under the agreement* by such refusal. *This* is the rule of New York law announced twice by the highest court of that State. *This* is flatly the converse of the rule announced by the Court of Appeals in the instant case that "the obligations of appellant and appellee under the agreement were mutual and reciprocal. Hence, while appellant's breach continued, he was in no position to demand performance by appellee" (R. 115). No New York authority is or can be cited for this proposition, as the law of New York is squarely to the contrary, as stated above. It was gross error for the Court of Appeals herein to ignore the law of the *Haskell* cases.

In the examination of plaintiff wife in the first *Haskell* case the following facts are shown at pp. 62-63 of the record:

"Q. Under the separation agreement, about which you have been asked, you get $250.00 a month from Mr. Haskell for your maintenance and support, do you not? A. Yes, sir.

Q. In May, 1917, did Mr. Haskell send you $250.00? A. He did not.

Q. And what did you do? A. I started a suit for the money.

Q. And did you receive $250.00 for the months of June and July, 1917, from Mr. Haskell? A. I did not.

Q. Well, what followed that? A. Then I brought another suit.

Q. In September, 1917, at the time that these letters, Defendant's Exhibits 1, 2 and 3, were written, was litigation pending between you and Mr. Haskell? A. Yes, sir."

At pages 83, 84, 85 and 86 of the first *Haskell* record appear these letters of demand, (Defendant's Exhibits 1, 2 and 3) as follows:

"

Defendant's Exhibit 1.

Copy of this letter sent to Arthur M. King and Ellenbogen & Selig.

September 6, 1917.

Mrs. Minna G. Haskell,
645 Madison Avenue,
New York, N. Y.

My dear Minna:

Phillips Academy, Andover, Massachusetts, will open for its fall term on the 18th inst. and it will be necessary for Will to leave New York for school with me on the 17th inst. It will also be necessary for him to come here to my office to see me on the 10th inst, at noon in order that I may procure for him any clothes which he needs to take with him.

I have written him that I shall expect to see him here on the 10th inst. and I wish you to know that I have so written him. It is quite necessary that he should be here at that time.

Very truly yours,

WM. S. HASKELL.

WSH:FM.
Registered.

Defendant's Exhibit 2.

September 11th, 1917.

Mrs. Minna G. Haskell,
645 Madison Avenue,
New York City.

My dear Minna:

I am enclosing a copy of a letter which I have today written to Will and I confidently expect that you will send him to me and see to it that he returns to school at Andover on the 17th inst.

Very truly yours,

WM. S. HASKELL.

Enc.
WSH/EL.

Defendant's Exhibit 2a.

September 11th, 1917.

Master William H. Haskell,
645 Madison Avenue,
New York City.

My dear Will:

Your letter of September 7th, last, was received by me yesterday. I note that you refuse to return to Andover. By so doing you are not only injuring yourself, by failing to get a good education, but you are also harming the very person whom you claim that you wish to assist, *i. e.*, your mother. I will not pay for your support unless you follow my instructions and I now again direct that you go to Andover on the 17th inst., and take up and continue your work there for the school year. It will be necessary, if you persist in your refusal, for you either to earn your own living or become a burden upon your mother.

I ask you to come to my office at noon on Thursday next, September 13th, 1917.

With much love,

FATHER.

WSH/EL.

Defendant's Exhibit 3.

Sept. 12/17.
645 Mad Ave.

William S. Haskell.

Sir:

I wish to inform you in answer to yours of the 11th, that I have had nothing whatever to do with Will's decision in regard to Andover.

I have urged him repeatedly to go, but he insists he would not do so, leaving me in the condition I am, but that he will willingly go as soon as you do what is right.

I do not choose to answer any more communications from you, and I think you know my attorney's address.

Yours truly,

MINNA GANS HASKELL."

On this record, judgment was entered by the Court of Appeals for defendant husband.

The second *Haskell* case was brought in the Municipal Court of the City of New York to recover monthly instalments in the sum of $250 each for the months of June, July, August and September, 1922. The issues in the second *Haskell* case put up to the Court of Appeals cannot be better stated than as they are stated by the wife's brief in the Court of Appeals, at pages 2 and 3 thereof, as follows:

The Present Action.

"The present action was brought in the Municipal Court on a separation agreement between the parties hereto to recover the sum of $1,000 consisting of four monthly installments of $250 each, which became due and payable to the appellant from the respondent on the 1st days of June, July, August and September, 1922, pursuant to paragraph five of said agreement (34-42).

The respondent's answer denied certain allegations of the complaint and set forth three separate and distinct defenses (46-60). Only the second and third defenses are material on this appeal.

The second defense is that the appellant failed to perform the agreements on her part to be performed (1) in that she brought an action against the respondent other than an action to enforce the provisions of said agreement (52), (2) in that she interfered with the education of the son of the parties, and with respondent's right to the sole direction of his support and maintenance, (3) in that she harbored said son in her residence without respondent's consent from and after September 19, 1917, until the summer of 1921, (4) in that appellant upheld said son in his disobedience to respondent, (5) in that respondent was not willing to consent and did not consent to said son leaving her during said times, and going to appellant, and (6) in that during said times she has refused to yield up the right of said son's education and custody for any portion of the time to appellant (52-54).

It will be seen that the breaches (2-6) are substantially similar. Our analysis of the appellant's obligations under the separation agreement shows that these breaches are all of no covenant which we have designated (1, 19).

The third separate defense pleads the prior suit as *res adjudicata* of the appellant's breach of the separation agreement (55-60).

It is important for the court to bear in mind that the order of reversal of the Appellate Division in the prior suit was subsequently resettled. The original order of the Appellate Division will be found at folio 895, and the resettled order will be found at folio 907.

At the conclusion of the appellant's case, no motion was made to dismiss the complaint (14). At the conclusion of the entire case, the respondent moved to dismiss on the ground "that the plaintiff has breached the contract of separation which is the basis of this suit" (456). Thereafter judgment for $1,087.42 was rendered in the appellant's favor (127-129). The Appellate Term affirmed said judgment with leave to appeal to the Appellate Division (13-15). The Appellate Division reversed the determination of the Appellate Term, and the judgment of the Municipal Court, two of the justices dissenting (1171-1173) and thereupon judgments were entered in the Supreme Court (1181-1187) and in the Municipal Court (1174-1180) dismissing the complaint on the merits (1186; 1180). Thereafter the Appellate Division granted a motion for leave to appeal to this court and certified "that in its opinion a question of law is involved which ought to be reviewed by the Court of Appeals" (1168).

The opinion of the Appellate Division will be found at folio 1192, and the dissenting opinion at folio 1198. There was no opinion by the Appellate Term or the Municipal Court."

Pages 4-7 of that brief following the ones above quoted are devoted to the issues of the first *Haskell* suit, which have already been stated *supra* pp. 36-38 and need not be copied here.

It is to be noted that in the second *Haskell* suit the testimony of the defendant husband, at pp. 85, 86, 87 and 88, bears out in every particular Mrs. Haskell's testimony quoted *supra*, p. 3, to the effect that the prior litigation between Haskell and his wife (in which definite and final judgments went against Haskell, which he had to pay) was still going on at the time of the demands in September 1917,

and even at the time that the first *Haskell* suit was commenced. This would seem to be a conclusive answer to the opinion of the Court of Appeals in the instant case. Whatever else the above quoted portion of that opinion may be (R. 115), *it is certainly not the law of New York.*

This fact is further brought out in the findings of fact in the decision of the first *Haskell* suit, which appear at pp. 210 and 211 of the record in the second *Haskell* case. There the 20th, 21st, 22nd and 23rd findings of fact read as follows:

"Twentieth: That the defendant did not pay to plaintiff the sum of Two hundred fifty (250) dollars during the months of May, June and July of 1917, as required by the separation agreement between the parties hereto.

Twenty-first: That thereafter two actions were brought against defendant for these sums.

Twenty-second: That in the first action, plaintiff obtained a judgment on June 29th, 1917.

Twenty-third: That in the second action, plaintiff obtained a judgment on October 4th, 1917, which was affirmed on appeal to the Appellate Term on January 2nd, 1918."

The order of reversal of the Appellate Division later affirmed by the Court of Appeals in the first *Haskell* case *did not reverse these particular findings,* as appears from page 300 of the record in the second *Haskell* case, which recites that these are left unaffected by the order of reversal.

On this record of the two *Haskell* cases there would seem to be no doubt but that the opinion of the Court of Appeals in the instant case is erroneous in the last three paragraphs in that it does not reflect the law of New York. We believe that this Court should issue a writ of certiorari to correct this deviation from the law of New York which this Court has said controls the rights of the parties hereto. *Atherton* v. *Atherton, supra; Erie* v. *Tompkins, supra.* We regret the length to which this Appendix has been carried, but in view of the exclusion of this and all other similar evidence herein we knew of no other way of actually placing before this Court the law of New York.